Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JOSHUA HOWARD, PAUL DAVID HOWARD,
and JOHN DOUGLAS HOWARD,

Petitioners

v.

COMMONWEALTH OF KENTUCKY,

Respondent

On Petition For Writ Of Certiorari
To The Commonwealth Of Kentucky
Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state trial court violates a defendant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution when: (1) the defendant is charged with three counts of bribery of a public official; (2) the defendant's culpability, if any, to one or more of the counts is as an accomplice to the offense based on an underlying conspiracy; (3) the defendant requests a jury instruction on the elements of conspiracy; (4) the trial court denies the defendant's requested instruction; and (5) the defendant is convicted of the charged offense?

2. Whether a state trial court violates a defendant's rights to due process of law, to trial by an impartial jury, to confront the witnesses against him, and to compulsory process for obtaining witnesses in his favor under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution when: (1) the trial court schedules three days for the defendant's trial; (2) the prosecution uses all three days to present its case against the defendant; (3) the defendant requests additional time to present his case and the trial court begrudgingly extends the trial by two days; (4) the trial court, with knowledge that defense witnesses are being cut to meet the court's time constraints, denies the defendant's further requests for time to present his case; and (5) the defendant is convicted of the charged offense?

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OPINION BELOW

The Commonwealth of Kentucky Court of Appeals' judgment and opinion in this case was unpublished and is attached in the Appendix hereto as Exhibit A. The orders entered by the Supreme Court of Kentucky summarily denying discretionary review were also unpublished and are attached in the Appendix hereto as Exhibits B and C.

JURISDICTION

The Commonwealth of Kentucky Court of Appeals entered an opinion affirming the Petitioners' convictions on May 28, 2004. The Supreme Court of Kentucky denied the Petitioners' motion for discretionary review on April 18, 2005. This petition is timely filed pursuant to United States Supreme Court Rule 13, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved herein are the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

> of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 2.

STATEMENT OF THE CASE

A. Statement of Facts

The events underlying this case began in October of 2000. At that time, the petitioner, Joshua Howard, was a college student at Eastern Kentucky University in Richmond, Kentucky, and he decided to invest in and open a nightclub in an effort to earn money while in school. Prior to opening the club, Joshua, his father, Joe Howard, and another relative, petitioner Paul Howard, met with an Alcoholic Beverage Control officer, Ed Robinson, to get information as to the procedures for obtaining a liquor license and the requirements of operating a bar in Kentucky. The club, named Club South, opened for business on January 9, 2001.

On January 25, 2001, Robinson visited Club South along with other ABC officers and asked to see the ABC license for the establishment. Robinson would later testify that while the officers found what they believed to be underage drinking, no citations were issued on this first visit. On February 8, 2001, Robinson again visited Club South with other ABC officers, including an officer named Phillip Woodall. During this second visit, the ABC officers cited several individuals for underage drinking, and cited Club South for providing alcohol to those individuals. It is undisputed that Joshua and Robinson spoke on the telephone the following day, February 9, 2001, however, the parties disagree as to the substance of that conversation. Joshua testified that Robinson told him that he could "buy back" the days the club would have to shut down for the citations, and that he got the impression Robinson was looking for a payoff in relation to the citations. Robinson, on the other hand, testified that Joshua made statements tending to indicate a willingness to "take care of" officer Robinson, and that he ultimately concluded that Joshua was offering to, or at least was willing to, bribe Robinson for favorable treatment.

On February 17, 2001, Robinson again visited Club South. During this visit, the parties set up a meeting for February 22, 2001 to be held at a local Shoney's restaurant. Although it was originally planned that Joshua's father would attend the Shoney's meeting, he could not make it because of work, and instead, Joshua's uncle, petitioner John Douglas Howard ("Doug"), accompanied Joshua to the meeting. At the Shoney's meeting, Robinson wore a concealed tape and transmitter, and the tapes of this meeting were played during the trial. The tapes reveal that both the Howards and Robinson made ambiguous statements tending to reinforce the respective initial impressions formed by Joshua and Robinson. For example, Robinson stated that Club South could be closed if they received another citation, and Doug responded to the effect that they were prepared to help Robinson out if he wanted to do that.

On March 1, 2001, Robinson and Woodall again visited Club South. It is undisputed that Robinson was wearing a "wire" during this visit and that Woodall was not equipped with any recording device. Oddly enough, only Woodall met privately with Joshua in the back of the club, and Joshua would later testify that Woodall made threats during this meeting that Joshua would be arrested and jailed relating to the citations if he did not pay up. A meeting was scheduled for March 5, 2001, at which Joshua, Paul, Doug, and Jeremy Howard met Robinson and Woodall at a local Bob Evans' restaurant. The meeting on March 5, 2001 was recorded by audio and video surveillance, and Robinson made the first reference to money during this meeting. Additionally, Robinson stated that Woodall had initially wanted $2,000.00, but that they had finally agreed on $1,000.00. It is undisputed that $1,000.00 was given to Robinson by Doug during this meeting. Two subsequent meetings occurred on April 11, 2001 and May 10, 2001, during which Joshua, meeting alone with Woodall, transferred two additional payments of $1,000.00. Joshua testified that these payments

were made because Robinson and Woodall had stated that they wanted the payments on a monthly basis.

At the May 10, 2001 meeting, Woodall told Josh Howard that a meeting had been arranged at a Reno's restaurant in Prestonsburg, Kentucky, at which time Paul and Doug could talk to an ABC official who might be able to help with the administrative charges against Club South. Paul and Doug were observed arriving at the Reno's, however, the planned meeting never took place. The petitioners were subsequently charged with three counts of Bribery of a Public Servant.

B. Procedural History

On July 16, 2001, the Grand Jury in Fayette County, Kentucky returned a three count indictment charging that the petitioners, Joshua Howard, Paul David Howard, and John D. Howard, AKA Doug Howard, committed the offense of bribery of a public servant on three separate occasions. KY. REV. STAT. ANN. § 521.020 (Michie 1999).[1] The petitioners were tried by jury beginning on August 13, 2002, and it was during the trial when the petitioners first raised the objections advanced herein.

The petitioners' objection to the jury instructions came during a bench conference following the presentation of evidence, with counsel objecting to the language used in the instructions on bribery, and with counsel reading from and requesting an instruction on conspiracy similar to the pattern jury instructions for the United States Court of Appeals for the Sixth Circuit.[2] The petitioners first raised the

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[1] Count 1 of the indictment also charged Jeremy Howard with Bribery of a Public Servant pursuant to an agreement or conspiracy. He was tried along with the petitioners named herein but has not appealed the judgment and is thus not a party to this Petition.

[2] Specifically, counsels for the petitioners objected that the jury instruction language was confusing in that it stated that the defendant could be found guilty if the jury believed "[t]hat the Defendant had an agreement with Paul David Howard, *and/or* John D. Howard . . ."

constitutional question relating to the instructions in their Motion for Discretionary Review to the Kentucky Supreme Court, in which the petitioners cited the Fifth and Fourteenth Amendments to the United States Constitution, as well as *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the principle that a jury must find all elements of an offense proven beyond a reasonable doubt.

The petitioners also repeatedly objected to the time constraints on their defense during the trial and affirmatively stated to the trial judge that witnesses were being cut to accommodate the court's limitations. Further, the petitioners made an objection to the trial court in which counsel for petitioners stated that the right to present a defense should not be jeopardized because of time constraints and that it was fundamentally unfair to allow the prosecution three days to put on its case while only allowing mere hours for the defense. The petitioners reiterated the constitutional question relating to the time limitations on their defense in their appeal to the Commonwealth of Kentucky Court of Appeals, in which the petitioners cited the Fifth, Sixth, Seventh, and Fourteenth Amendments to the United States Constitution. The petitioners repeated the constitutional arguments advanced in the trial court and the Court of Appeals in their Motion for Discretionary Review to the Supreme Court of Kentucky.

The jury ultimately returned a verdict of guilty for each defendant on all three counts. The jury recommended a total of five years imprisonment for Joshua Howard and fifteen years imprisonment for Paul and Doug Howard. On September 18, 2002, the Fayette Circuit Court entered final judgment placing Joshua Howard on probation for five years.

(emphasis added), and counsels argued that the instruction should be similar to the pattern jury instructions for conspiracy and merely recite the requirement of an agreement. The Commonwealth has argued that this issue is not preserved, however, the argument before the trial court adequately put the court on notice of objection to the instructions, and therefore, any objection to preservation is without merit.

Paul and Doug Howard were each sentenced to ten years in prison.

A timely notice of appeal was filed, and on May 28, 2004, the Commonwealth of Kentucky Court of Appeals rendered an opinion affirming the petitioner's convictions. The petitioners moved for discretionary review in the Supreme Court of Kentucky, which was denied by order as to all three petitioners on April 18, 2005. This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

First, the trial court's denial of the petitioners' requested instruction on conspiracy, and the decision by the Commonwealth of Kentucky Court of Appeals affirming the trial court's ruling were contrary to precedent of this Court interpreting the United States Constitution. Second, the trial court's denial of the petitioners' requests for additional time to present their defense and the decision by the Commonwealth of Kentucky Court of Appeals affirming the trial court's rulings involve an important issue of United States Constitutional law that has not been settled by this Court.

ARGUMENT

I. THE TRIAL COURT'S DENIAL OF THE PETITIONERS' REQUESTED INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE EVERY ELEMENT OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT AND THUS VIOLATED THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW

The United States Constitution guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. A